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IN THE

Supreme Court of the United States

GREGORY D. STUMBO, *et al.*,

Petitioners,

v.

HOBART WARD ANDERSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, COMMON CAUSE OF KENTUCKY, AND THE NATIONAL VOTING RIGHTS INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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BRIEF IN SUPPORT OF PETITIONERS

With the consent of the parties, *amici curiae* the Brennan Center for Justice at NYU School of Law, Common Cause of Kentucky, and the National Voting Rights Institute hereby submit their brief in support of Petitioners.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are nonpartisan organizations that support effective campaign finance systems at the federal, state, and local levels, including systems containing provisions of the sort at issue in this case. More detailed statements of the interests of the *Amici* are attached in Appendix A to this brief.

SUMMARY OF ARGUMENT

Reading the circuit court's opinion was like seeing a ghost. Barely one month after this Court had interred the distinction between "express advocacy" and "issue advocacy"—a distinction the Court called "functionally meaningless"—the Sixth Circuit not only exhumed it but extended it to a context in which it had never been used. As the petition explains, the circuit court opened the door to vote buying and voter intimidation by limiting Kentucky's ban on "electioneering" at polling places to express advocacy. What gives the case exceptional importance is the threat that the same functionally meaningless construction will remain the default construction for *any* election-related law challenged as vague or overbroad. This Court should stop lower federal courts from routinely construing state laws into insignificance. *See* Point III.

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1. Letters of consent have been filed with the Clerk of this Court. No party's counsel authored any part of this brief. No person or entity other than *Amici* contributed monetarily to preparing or submitting the brief.

The Sixth Circuit also sowed confusion by splitting from other circuits and state courts of last resort on two questions of national importance in the field of campaign finance. The first is the constitutionality of "trigger" provisions, which are critical to public finance systems in more than 20 States and localities. Almost all public finance systems ask candidates to accept spending limits in exchange for public funds. Triggers remove the voluntary spending cap, and in some jurisdictions provide additional public funds, if a nonparticipating candidate exceeds the cap. Triggers reassure candidates that if they agree to limit their own expenditures, they will not be grossly outspent by opponents who opt out. Without triggers, public finance systems can founder or even collapse, just as the federal matching-fund system for presidential primary elections appears to be doing. *See* Point I.

The second campaign finance issue on which the Sixth Circuit created a split of authority is the interplay between Kentucky's limit on candidates' lending to their own campaigns and its ban on post-election fundraising. These provisions prevent public officeholders from soliciting contributions that effectively go straight into their own pockets. Under the Sixth Circuit's decision, wealthy candidates can "lend" their campaigns unlimited sums and then, when in office, repay themselves by raising money from people seeking government contracts. This gambit skates very close to bribery. It certainly creates at least the appearance that a "pay to play" system is in effect. States have a compelling interest in preventing that appearance, let alone the reality. This Court should resolve the split of authority to make clear that States can introduce effective prophylactic measures to combat real and apparent corruption. *See* Point II.

ARGUMENT

I.

The Sixth Circuit's Decision Throws Campaign Finance Law Into Disarray.

A. The Opinion Below Threatens Public Finance Systems Around the Nation.

The Sixth Circuit's decision striking down Kentucky's trigger provision calls into question the laws of at least eleven other states and nine localities and could stymie reform of the federal presidential campaign finance system. A review of different jurisdictions' public finance systems reveals the variety of state and local policies that are threatened by the Sixth Circuit's opinion. Appendix B to this brief catalogs the systems of those states and localities.

Irrespective of the details, triggers are vital to public finance systems that use them. "[A] voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice." *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998). Though public finance systems vary from jurisdiction to jurisdiction, triggers serve the same function wherever they are used. In exchange for some form of public funding, candidates accept voluntary spending limits. Triggers assuage candidates' fear that if they agree to spending caps, opponents will opt out of the system and grossly outspend them. If triggers cannot be used, the very concept of public financing is in jeopardy.

The breakdown of the presidential primary funding system illustrates the problem. During the 2000 Republican primaries, then-Governor Bush chose not to accept matching funds, raising

and spending far more than the $40.5 million limit faced by other candidates. *See* FEC, FEC Announces 2000 Presidential Spending Limits, *at* http://www.fec.gov/press/press2000/preslimits2000.htm. By 2004, two leading Democratic candidates also opted out, fearing that they would otherwise be unable to compete with the $200 million that now-President Bush intended to amass and spend before his renomination in September. *See* Glen Justice, *Irrelevance Stalks a Post-Watergate Invention*, N.Y. Times, Nov. 16, 2003, § 4 at 3. Many even speculated that Senator Kerry, the presumptive Democratic nominee, would opt out of the full public funding system for the general election, believing he could raise more than the $75 million on offer from the government. Jodi Wilgoren, *Kerry Tends to Some Core Democratic Constituencies*, N.Y. Times, July 13, 2004, at A16. Unless the system is fixed, the consensus among political observers is that no serious candidate will again participate in the public finance system in the primaries, and 2004 may be the last year in which the candidates accept full public funding for the general election.

The Sixth Circuit's opinion implies that all systems that use triggers are unconstitutional. The decision casts doubt on existing triggers (outside circuits that have reached contrary holdings, as we explain below) and hinders attempts to fix systems that are in danger of becoming obsolete. *See* Kenneth N. Weine, *Triggering the First Amendment*, 24 J. Legis. 223, 236 (1998) ("[T]riggers are merely a modernization device for campaign finance systems."). Leading reformers in Congress have introduced a bill to correct several serious weaknesses in the federal system, including its lack of a trigger. *See* S. 1913, § 4(d), 108th Cong.; H.R. 3617, § 4(d), 108th Cong. If the Sixth Circuit is right, that bill is unconstitutional. Legislators often hesitate to support a bill while constitutional doubts remain. Despite widespread agreement that the current system is

unsustainable, failure to overturn the circuit court judgment implicitly condemning the bill could delay or preclude Congress's consideration of needed reforms.

The opinion below threatens both major classes of public finance systems: partial public funding by matching private contributions; and full public funding, also known as "clean money." Kentucky uses a matching system. Some matching systems match only part of each private contribution; the federal government, for example, matches only the first $250 contributed by each individual to a candidate in the presidential primaries. 26 U.S.C. § 9034(a). Systems also vary in the ratio of matching funds to contributions. The federal system provides a one-to-one match, in which a candidate who receives a $250 contribution also receives $250 of public money. *Id.* Kentucky's system matches contributions at a two-to-one ratio, so that a gubernatorial candidate must raise only $600,000 privately in order to reach the $1.8 million spending cap. Ky. Rev. Stat. § 121A.080(1). The highest ratio of which we know is New York City's four-to-one match. N.Y.C. Admin. Code § 3-705(2).

Other jurisdictions have adopted "clean money" systems offering full public funding. Candidates must solicit a certain number of nominal contributions, usually five or ten dollars, to ensure that public money is not claimed by frivolous candidacies lacking any popular support. Once a candidate has received the required number of contributions, the government funds the campaign up to the voluntary spending limit, and the candidate need not (indeed, is not permitted to) raise any more private money. *See Daggett v. Comm'n on Gov't al Ethics & Election Practices*, 205 F.3d 445, 451 (1st Cir. 2000) (describing Maine's clean money system). Clean money systems may be particularly attractive for judicial elections to protect judges from depending

on contributions from counsel or litigants who frequently appear before them. N.C. Gen. Stat. §§ 163-278.61 *et seq.*

There are other variations. The federal system, for instance, is a hybrid. A matching system is used during the primaries, but there is full public funding for the general election. *Compare* 26 U.S.C. § 9004 (full public funding) *with id.* at 9034 (matching funds in primary). Michigan uses a similar hybrid. Mich. Comp. Laws §§ 169.264, 169.265. In Nebraska's unique system, candidates who agree to the spending cap receive no public funds initially but are eligible for funds if a nonparticipating candidate estimates that he will exceed the cap. Neb. Rev. Stat. §§ 32-1604, 32-1606.

Like other aspects of public funding, triggers are structured differently according to each jurisdiction's needs and constraints. The first major variable is whether a trigger can be activated by third-party spending independent of any candidate's campaign, as in Arizona, or only by a nonparticipating candidate's spending or receipt of contributions, as in Kentucky. *Compare* Ariz. Rev. Stat. § 16-952 *with* Ky. Rev. Stat. § 121A.080(4). The next question is what happens when a trigger is activated. Most jurisdictions lift the cap on participating candidates, but not all systems provide additional public money. Kentucky does continue to match contributions once the cap has been lifted. Ky. Rev. Stat. § 121A.030. Most jurisdictions that provide additional public funds limit their financial exposure, enabling high-spending opponents or independent groups to outspend participating candidates in some cases. Maine, for example, will not give a participating candidate more than twice the voluntary spending cap, even if a nonparticipating candidate spends many times that amount; since Maine uses a clean-money system, participating candidates are barred from trying to make up the difference through private contributions. *See Daggett*, 205 F.3d at 451.

The Sixth Circuit decision that stands to chill both improvements in the federal system and further experimentation by states and localities is, moreover, inconsistent with decisions in the First and Eighth Circuits. Both of those courts—the only courts of appeals to have considered the question—upheld triggers. *Id.* at 445; *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). *Daggett* upheld a trigger as applied to both candidate and independent expenditures. The Eighth Circuit upheld a trigger as applied to expenditures by nonparticipating candidates (calling into question its prior rejection of a trigger as applied to independent expenditures, *see Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994)).

The Sixth Circuit's understanding of the First Amendment squarely conflicts with that of other circuits. The First Circuit concluded that triggers inflicted no constitutionally cognizable burden at all. "We cannot . . . equate[] responsive speech with an impairment to the initial speaker." *Daggett*, 205 F.3d at 465. The Sixth Circuit, on the other hand, thought triggers imposed such a burden as to amount to an unconstitutional "limit" on expenditures. *Anderson v. Spear*, 356 F.3d 651, 667 (6th Cir. 2004). This fundamental disagreement over the meaning of the First Amendment calls out for resolution.

B. Sixth Circuit Doctrine Confers Unprecedented and Unjustifiable Privileges on Self-Financed Candidates.

This Court might be tempted to resolve the circuit split by distinguishing this case from *Daggett* and *Rosenstiel*. But the giving legal effect to the distinction—as the panel apparently did in distinguishing an earlier Sixth Circuit decision—creates a problem even more serious than a split of authority. Thanks to the decision below, Sixth Circuit law protects expenditures by wealthy, self-financed candidates more stringently than it

protects identical expenditures by candidates who raise money from supporters. That perverse disparity has no support in this Court's jurisprudence, with good reason: it cannot be rooted in any plausible theory of the First Amendment.

The Sixth Circuit relied on *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), for its decision but misapprehended *Buckley*'s holding. In striking down FECA's limits on candidates' campaign expenditures, *Buckley* created no constitutional distinction between expenditures financed by a candidate's personal wealth and expenditures financed by contributions from others. The Court used the same reasoning to strike down both limitations on both types of expenditures and did so in the same section of the *Buckley* opinion. *Id.* at 51-54 (discussing expenditures from personal wealth); 54-59 (discussing overall spending by a campaign). Nothing in *Buckley* suggests that the constitutionality of a trigger activated by nonparticipating candidates' expenditures should turn on whether a candidate is spending personal wealth or money collected from contributors.

In the Sixth Circuit, however, that is precisely what the question turns on. A previous panel upheld Kentucky's trigger. *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998). The *Anderson* panel acknowledged that it was bound by *Gable*'s holding. *Anderson*, 356 F.3d at 676–77. The *Anderson* panel therefore struck down the trigger only as applied to self-financed candidates.

The panel reasoned as follows: The trigger is activated when a nonparticipating candidate accepts more than $1.8 million in contributions; the statute defines "contribution" to include a candidate's donation of money to his own campaign committee; the only reason for the committee to take the candidate's money is to spend it; therefore, the trigger limits expenditure of the candidate's own money. *Id.* at 667 ("Because Kentucky's

definition of contribution includes what are candidate expenditures, and because this definition is relied upon by other segments of the regulatory scheme to indirectly limit candidate expenditures, the statute infringes upon constitutionally protected speech.").[2]

The same reasoning would apply equally, however, to candidates' expenditure of money donated by others. Just as the only reason for a committee to accept money from the candidate is to spend it, the only reason for the committee to accept money from someone else is to spend it. If a trigger based on a candidate's contributions burdens expenditures, then a trigger based on contributions from others also burdens expenditures. *See Gable*, 142 F.3d at 947 ("The crux of [Gable's] claim is that the effect of the Trigger is to coerce him into limiting his campaign spending to $1.8 million, thereby forgoing protected speech."). If one is unconstitutional, so is the other—unless expenditure of candidates' own money receives more constitutional protection than expenditure of money collected from supporters.

The decision below conflicts with other circuits over whether triggers place constitutionally appreciable burdens on candidate expenditures in the first place. Worse, however, is the bizarre implication of the tension between *Anderson* and *Gable*. Imagine two candidates, each of whom has $1 million in his committee's bank account. One candidate wrote a check for $1 million on his personal account; the other raised $1 million from contributions subject to the jurisdiction's contribution limits. Any district court in the Sixth Circuit must conclude

2. The panel purported to strike down the statutory definition of "contribution." Anderson claimed that the trigger, by incorporating the definition, "deterred him from making expenditures." The opinion rejected this approach in favor of a "facial" analysis of the definition itself. *Anderson*, 356 F.3d at 667.

that the first candidate has a greater right to spend his $1 million without regulatory consequence than does the second candidate. The implications go far beyond trigger provisions. Any regulation that indirectly affects expenditures is subject to the Sixth Circuit's doctrine that self-financed candidates have more rights than contributor-financed candidates. The Court should repudiate that pernicious doctrine before it takes hold in other contexts.[3]

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3. *Anderson*'s distinguishing of *Gable* is probably wrong even on its own terms, because *Gable* recognized that nonparticipating candidates' contributions to their own campaigns can activate the trigger. *See Gable*, 142 F.3d at 944 ("When a non-participating slate collects more than $1.8 million . . . including contributions from the candidates themselves, the Trigger is activated."). The *Gable* plaintiff, Robert Gable, was almost surely self-financed, at least in part, in his 1995 run for governor. During the 1994 and 1996 election cycles, Gable and his wife Emily gave more than $85,000 to federal candidates, PACs, and parties; it is scarcely conceivable that Gable gave nothing to his own campaign at the same time. *See* http://www.opensecrets.org/indivs/index.asp (searchable database of reported contributions). The Gables also gave $4000 to current Kentucky Governor Ernie Fletcher during his successful run in 2003. *See* http://www.kref.state.ky.us/krefsearch (Kentucky Registry of Finance database). Gable, who chaired the Kentucky Republican Party from 1986 to 1994, is heir to "an empire in coal and timber" who is active in business, politics, and philanthropy. *See* Bill Estep, *Judge: Coal Rights Trump Public Land*, Lexington Herald-Leader, Aug. 30, 2002, at A1; Bill Estep, *Money Owed Gable's Firm Is Doubled*, Lexington Herald-Leader, Sep. 11, 2003, at B1; *The Blue Moon*, vol. 11, no. 2 (Mar.-Apr. 2004), *available at* http://artscouncil.ky.gov/bmoon/marapr04/03.htm.

II.

Review Is Warranted to Protect States' Power to Prevent Public Officials from Demanding Gifts from People with Business before the Government.

The Sixth Circuit struck down two related provisions that the Commonwealth's legislature found essential to preventing corruption and the appearance of corruption. Kentucky law permits gubernatorial candidates to lend up to $50,000 to their campaigns (along with a completely unlimited amount of outright gifts). A separate provision prevents candidates from soliciting campaign contributions after the election. The Sixth Circuit struck down both restrictions. Under the regime the Sixth Circuit imposed on Kentucky's citizens, a candidate can spend as much as he wants on his campaign, call it a "loan" to his campaign committee, and then, after winning, extract contributions that permit the now insolvent committee to repay the loan. In that all-too-likely scenario, post-election contributions would effectively go straight into the elected official's pocket.

When public officials press state contractors to give them money for their own personal accounts, we call it extortion. When contractors voluntarily make gifts in the expectation of receiving state business, we call it bribery. If the Sixth Circuit opinion did not quite legalize extortion and bribery, it permitted elected officials to solicit money that citizens will reasonably perceive as bribes. The decision also makes it more difficult to prosecute genuine bribery by giving perpetrators a lawful pretext for corrupt payments.

Other states have apparently reached this conclusion, because they have also limited candidates' loans to their committees and banned post-election fundraising. Courts in those states, moreover, have upheld the rules. *See State v. Alaska*

Civil Liberties Union, 978 P.2d 597 (Alaska 1999); *Ferre v. State*, 478 So. 2d 1077 (Fla. Dist. Ct. App. 1985), *adopted*, 494 So. 2d 214 (Fla. 1986). *But see Opinion of the Justices*, 637 N.E.2d 213 (Mass. 1994) (advisory opinion holding that a ban on fundraising during non-election years would be unconstitutional).

In last year's recall election, then-candidate Arnold Schwarzenegger lent his campaign $4 million, apparently violating state law limiting such loans to $100,000. *See* Cal. Gov't Code § 85307(b). After the election, a California court enjoined now-Governor Schwarzenegger from soliciting post-election contributions to repay the loan to himself. *Camp v. Schwarzenegger*, No. 03AS05478, slip op. at 27–28 (Cal. Super. Ct. Sacramento County Jan. 27, 2003), *at* http://www.saccourt.com/geninfo/News_Media/Docs/Camp%20v.%20Schwarzenegger.PDF. Although California does not have a general ban on post-election contributions, the court noted the particular problems caused when such contributions are used to repay candidates' loans to their own campaigns. *See id.* at 18–19.

By overlooking those problems, the Sixth Circuit invited a "pay to play" system completely antithetical to the First Amendment: victims are pressed to contribute to politicians irrespective of whether they support those politicians and their policies. It is bad enough that such pressure can be brought to bear before an election. *See, e.g.*, Brief of Amici Curiae Committee for Economic Development, Warren E. Buffett, Edward A. Kangas, Jerome Kohlberg, Paul Volcker, and Sixteen Other Business Leaders at 6-15, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02–1674), *available at* 2003 WL 21841439 (discussing the pressure business leaders felt to give soft money before BCRA). After the election—just when any ideological or communicative function of contributions

virtually disappears—contributors' hope of receiving favorable governmental treatment dramatically increases. *See Alaska Civil Liberties Union*, 978 P.2d at 630 ("Post-election time limits, however, far more clearly address corruption and its appearance because the election has resolved the critical contingency of which candidate will hold office."); *Ferre*, 478 So. 2d at 1080 n.9 ("There is, however, a rational distinction between a bet and a bet on a sure thing.").

It is remarkable how dramatically contributors' allegiance can shift after Election Day. The winner of the 1982 Texas gubernatorial election received 90 post-election contributions, ranging from $10,000 to $50,000, from contributors who had given to his opponent before the election. Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 827 n.157 (1985). When Democrats unseated seven incumbent Republican senators in the 1986 midterm election, "'there were 150 instances in which a PAC gave to the GOP candidate before the election and then made a contribution to the victorious Democrat after the votes were counted.'" Daniel Hays Lowenstein, *On Campaign Finance Reform: the Root of All Evil Is Deeply Rooted*, 18 Hofstra L. Rev. 301, 312 (1989) (quoting Larry Sabato, *Real and Imagined Corruption in Campaign Financing, in Elections American Style* 155, 155 (A. Reichley ed., 1987)). The temptation to give and solicit corrupt contributions to a candidate's campaign committee is considerable in any case. But when the committee is a mere conduit to the candidate's own bank account, the temptation can only become stronger. *See United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1277, 1280 (D.D.C. 1996) (noting that post-election contributions can promote quid pro quo arrangements with candidates who run campaigns at a deficit) (quoting *FEC v. Lance*, 617 F.2d 365, 372 n.4 (5th Cir. 1980)).

Unfortunately, the fear that some candidates will succumb to temptation is not fanciful. At least seven governors have been convicted, indicted, or investigated for bribery in just the past four years.[4] Kentucky has suffered its share of corruption—including a federal investigation of a governor who used precisely the lend-now-collect-later approach endorsed by the Sixth Circuit (the governor's nephew went to prison for bribery, but the governor was not indicted).[5] The opinion is a blueprint for making bribes look legitimate.

The loan limit and the ban on post-election contributions work in tandem to combat corruption. The loan limit permits candidates to lend seed money to their campaigns while limiting their personal financial stake in donors' pre-election contributions. The ban on post-election fundraising prevents elected officials' from demanding contributions to pay off campaign debts to themselves. Neither law stops wealthy candidates from simply paying for their campaigns if they wish. Although each provision is useful on its own, the combination serves to prevent the worst examples of corruption.

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4. *See, e.g.*, David Kocieniewski, *A Gov. Unindicted, But Implicated*, N.Y. Times, July 9, 2004, at B1; Marc Santora, *Conn. Panel Issues Findings on Rowland's Acts*, N.Y. Times, June 29, 2004, at B1; Shaila K. Dewan, *Former Gov. of Ala. Is Indicted*, N.Y. Times, May 28, 2004, at A15; *Court Denies Ex-Gov. Pension*, N.Y. Times, Mar. 27, 2004, at A9; Monica Davey, *Former Gov. Ryan of Ill. Is Indicted on Graft Charges*, N.Y. Times, Dec. 18, 2003, at A36; David M. Halbfinger, *DiFrancesco Quits Bid for Gov., Stung by Scrutiny*, N.Y. Times, Apr. 26, 2001, at A1; Rick Bragg, *Ex-Gov. of La. Gets 10 Years*, N.Y. Times, Jan. 9, 2001, at A12.

5. *See, e.g., W.G. Wilkinson, 60, Ky. Gov. Who Faced Scandals* (Obit.), N.Y. Times, July 6, 2002, at A14; B. Drummond Ayres Jr., *With Leaders Leaving Office for Jail, Ky. Works to Refurbish Image*, N.Y. Times, Sept. 19, 1993, at 26; *Ky. Officials Arrested*, N.Y. Times, Mar. 15, 1986, at 9.

III.

Federal Courts Should Not Construe State Laws to be "Functionally Meaningless."

For a quarter of a century, campaign finance law labored under lower courts' belief—since shown to be mistaken—that most expenditure-related regulation could apply only to "express advocacy." Almost all federal circuits further held that only so-called "magic words" could be regulated as express advocacy. *See Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003) (collecting cases). States could prohibit corporations and unions from paying for campaign advertisements, for example, only if the advertisements included phrases like "Vote for Smith" or "Defeat Jones." It was child's play to avoid the magic words while still unmistakably urging voters to support or oppose a particular candidate. *See McConnell v. FEC*, 124 S. Ct. 619, 696 (2003).

Last Term, this Court clarified "that the express advocacy restriction is a product of statutory interpretation, not a constitutional command." *Id.* at 688. Indeed, the Court said, "*Buckley*'s magic-words requirement is functionally meaningless." *Id.* at 689. After *McConnell*, no one could mistake express advocacy for a substantive constitutional boundary.

The very next month, the Sixth Circuit not only revived the express advocacy restriction but applied it in a new context. The opinion below threatens to become the first in a line of post-*McConnell* decisions reinstating the express advocacy test as the default interpretation of any election-related statute that is claimed to be ambiguous. Briefs and articles are already citing *Anderson* for that very proposition. Since, as *McConnell* recognized, limiting a statute to express advocacy practically amounts to striking it down, this Court should correct the Sixth

Circuit's error before States are doomed to another quarter-century of hobbled regulation.

Petitioners have challenged two distinct holdings against the Kentucky statute that establishes buffer zones around polling places. The first might be called the geographical holding: a 500-foot radius, said the Sixth Circuit, is too large. We focus here on the second holding: irrespective of the size of the buffer zone, the only thing prohibited inside it is express advocacy, presumably of the magic-words variety.[6] That second holding, standing alone, eviscerates the statute. Even if the buffer zone covered the entire precinct, the Sixth Circuit's construction would permit a vote buyer to walk right up to the voting booth so long as he wore a T-shirt saying: "Tell Governor Green to stop raising our taxes."

That construction let the express advocacy genie back out of the bottle. As this case illustrates, imposing an express advocacy limitation as a "saving" construction can render a variety of statutes—not only those in the field of campaign finance—"functionally meaningless." The panel, however, viewed this crippling construction as the default interpretation. *See Anderson*, 356 F.3d at 664–65 (*McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth"). Opponents of campaign finance reform have already seized upon *Anderson* to press this approach. Two of the Nation's leading anti-reform advocates (counsel for Respondents in this case) argued that *Anderson*

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6. We support Petitioners' request that the Court review both questions presented regarding the buffer-zone statute, although this brief addresses only the Sixth Circuit's imposition of a magic-words requirement.

supports routine use of the express advocacy test to resolve vagueness and overbreadth challenges:

> The test is a familiar, easily-applied constitutional adjudication tool with which the courts have become comfortable over the years as it has been woven into the fabric of the law for nearly three decades. It is a bright-line test that resolves vague statutes in a constitutionally defensible way. It is a reliable cure for vagueness and overbreadth. . . .

James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining* McConnell*'s Exception to* Buckley*'s General Rule Protecting Issue Advocacy*, 31 N. Ky. L. Rev. 289, 318 (2004). Similar arguments are appearing in briefs before this and other courts. *See, e.g.*, Brief for Amici Curiae Chamber of Comm. of the U.S. et al. at *11, *In re Hammond*, No. 04–0089 (Tex. 2004), *available at* 2004 WL 1237317 (claiming express advocacy is "how the statute must be limited in order to preserve it") (citing *Anderson*); Opp. to Petition for Cert., *Leake v. N.C. Right to Life, Inc.*, No. 03–910 (Mar. 23, 2004) (arguing that States have only "two choices for the regulation of campaign finance expenditures: . . . the express advocacy test, or . . . the functional equivalent of express advocacy through clearly defined requirements for timing, media, and audience") (citing *Anderson*).

Certiorari should be granted to clarify the continued vitality (if any) of the express advocacy concept. Certainly, statutes that had already been construed, before *McConnell*, as limited to express advocacy might continue to bear the same construction until amended. But *Anderson* reached out to impose that limitation not only upon a new statute, but upon text that differed from Kentucky's express-advocacy-only laws. *See, e.g.*, Ky. Rev. Stat. § 121A.010(13) ("'Independent expenditure' means the

expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate. . . ."). By contrast, the buffer-zone statute uses the same term—"electioneering"—Congress used in BCRA to go *beyond* express advocacy. The Commonwealth used what might be called express express advocacy language when it wanted to import the *Buckley* definition, but the Sixth Circuit ignored that fact in its rush to create an implied express advocacy provision.

The decision below thus raises important considerations of federalism and comity. Barely a month after this Court explained how porous the express advocacy definition is, the Sixth Circuit construed an important Kentucky law out of existence. The court did not even ask the Commonwealth for its views on how *McConnell* might affect the question, ruling without the benefit of any supplemental briefing or argument. This Court has long cautioned against federal courts' precipitate invalidation or construction of state laws. *See, e.g.*, *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

> Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.

Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997). If any court is to squeeze the statutory text into an express advocacy box, it should be the Supreme Court of Kentucky. *See Majors v. Abell*, 317 F.3d 719, 724 (7th Cir. 2003) (Posner, J.) ("A state court is bound to have a better idea of the elasticity of the state's statutes than a federal court would have.").

> Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring); *see also* Ky. R. Civ. P. 76.37 (permitting certification). The decision below created a vacuum in State law and failed to respect the authority of the Commonwealth of Kentucky and its citizens' interest in corruption-free government.

The court below affronted not only the Kentucky legislature that passed the buffer-zone statute and the Kentucky judiciary whose function it is to construe the statute, but also the Kentucky executive, which had already construed the statute in a different fashion. The panel apparently felt no need to respect Kentucky administrative agencies' interpretation of Commonwealth law; in another portion of the opinion, it derided the notion that such interpretations might receive the *Chevron* deference routinely accorded federal agencies' interpretations of federal law. *See Anderson*, 356 F.3d at 669. This Court, on the other hand, has said—in the context of a First Amendment overbreadth challenge like this one—that it will not ignore authoritative State executive-branch interpretations of State laws. *Broadrick v. Oklahoma*, 413 U.S. 601, 617–18 (1973); *see also Pharm. Research & Mfrs. of Amer. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001); *Federal Trade Comm'n v. MTK Mktg., Inc.*, 149 F.3d 1036, 1039–40 (9th Cir. 1998) (citing *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). The panel should have recognized the expertise of the Kentucky Board of Elections in applying the buffer-zone statute, not

cursorily rejected the Board's construction. *See Anderson*, 356 F.3d at 665.

That is not to say that this case requires the Court to decide whether State administrative agencies are entitled to *Chevron* deference or whether the circuit court should have certified the statute's construction to the Kentucky Supreme Court. Rather, the ham-handed fashion in which the opinion effectively dismantled a State law simply underscores the threat it poses as the first appellate decision to address an issue of this nature since *McConnell*. The *Anderson* opinion, if allowed to stand, will be a model not merely for using express advocacy as a default construction in election-law cases, but for federal courts' imposing that construction on unwilling States.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request that the Court grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

INTERESTS OF *AMICI*

The **Brennan Center for Justice at NYU School of Law** is a nonpartisan organization dedicated to a vision of inclusive and effective democracy. The Center was part of the legal team that successfully defended the Bipartisan Campaign Reform Act ("BCRA") in *McConnell v. FEC*, 124 S. Ct. 619 (2003), representing BCRA's congressional sponsors as defendants in the district court and respondents in this Court. The Center also successfully represented respondent Joan Bray in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). The Center participated as *amicus curiae* in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), and *FEC v. Beaumont*, 539 U.S. 146 (2003).

Common Cause of Kentucky ("CC/KY") is a non-profit, non-partisan membership organization and a vehicle for citizens to take action holding their elected leaders accountable to the public interest. Common Cause was founded in 1970 and has more than 250,000 members nationally; approximately 1,000 of them are citizens of Kentucky. CC/KY participated as *amicus curiae* in *Gable v. Patton* and other campaign finance cases decided by the Sixth Circuit.

The **National Voting Rights Institute** ("NVRI") is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to equal and meaningful participation in every phase of electoral politics. NVRI litigates cases throughout the country defending the constitutionality of campaign finance reform measures, such as those at issue here, that protect the integrity of the electoral process and enhance meaningful political participation by all citizens.

APPENDIX B

States With A Trigger Provision				
States	**Type of Program** (i.e., how initial public funding is distributed)	**Triggering Event**	**Consequences of Trigger**	**Trigger Provision**
Arizona	Lump sum	The total of a candidate's fundraising or spending, plus independent expenditures, exceeds the original spending limit	Spending limit and public funding are readjusted to match opposition fundraising or spending, up to two times the original limit	Ariz. Rev. Stat. § 16-952
Florida	2 to 1 match for contributions up to $250	A nonparticipating candidate's spending exceeds the original spending limit	Spending limit is readjusted to level that nonparticipating candidate reaches; public funds, equal to the new limit (but not to exceed two times the original limit), are distributed to participating candidates	Fla. Stat. § 106.355
Maine	Lump sum	The total of a candidate's fundraising or spending, plus independent expenditures, exceeds the original spending limit	Spending limit and public funding are readjusted to match opposition fundraising or spending, up to two times the original limit	Me. Rev. Stat. tit. 21-A, § 1125(9)
Michigan	General Election: Lump sum; Primary Election: 2 to 1 match for contributions up to $100	Gubernatorial candidate receives contributions over $340,000	The spending cap is lifted for nonparticipating candidates, but limit on public funds remains the same	Mich. Comp. Laws § 169.269
Minnesota	Tax check off funds put into fund account and distributed based on statutory percentages	A nonparticipating candidate's fundraising or spending exceeds statutory percentages of the spending limit	The spending cap is lifted for nonparticipating candidates, and they remain eligible for public funds	Minn. Stat. § 10A.25 (Subd. 10)

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States	Type of Program (i.e., how initial public funding is distributed)	Triggering Event	Consequences of Trigger	Trigger Provision
Nebraska	Lump sum; no public funds if all candidates agree to participate	The highest estimated maximum expenditure filed by any of the candidate's opponents is greater than the spending limits and the opponent spends 40% of their estimated total expenditure	The candidate is entitled to public funds in the amount of the difference between the spending limit and the highest estimated maximum expenditure filed by any of the candidate's opponents.	Neb. Rev. Stat. §§ 32-1601 and 32-1606
New Mexico	Lump sum	The total of a nonparticipating candidate's fundraising or spending, plus independent expenditures, exceeds the original spending limit	Spending limit and public funding are readjusted to match opposition fundraising or spending, up to two times the original limit	N.M. Stat. § 1-19A-14
North Carolina	Lump sum	The total of a candidate's fundraising or spending, plus independent expenditures, exceeds the maximum qualifying contributions amount in a primary election or the base level of funding available to participating candidates in the general election	Spending limit and public funding are readjusted to match opposition fundraising or spending, up to two times the original limit	N.C. Gen. Stat. §§ 163-278.62(18) and 163-278.67
Ohio	Not a public financing system	A candidate reports intent to use a certain amount of their personal wealth	Lifts contribution limits of opponent	Ohio Rev. Code § 3517.103(C), (D)
Rhode Island	2 to 1 match for contributions up to $500; 1 to 1 match for contributions over $500	A nonparticipating candidate's spending exceeds the original spending limit	Spending limit is readjusted to level that nonparticipating candidate reaches	R.I. Gen. Laws § 17-25-24

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States	Type of Program (i.e., how initial public funding is distributed)	Triggering Event	Consequences of Trigger	Trigger Provision
Wisconsin	Lump sum	Presence in the general election of a nonparticipating candidate who received at least 6% of the total vote cast in the primary election	Spending cap and contribution limits are lifted for participating candidates in the general election	Wis. Stat. § 11.50 (2)(i)